UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

SCHREE R. WADE, a married person, Plaintiff, v. PREMERA BLUE CROSS, a corporation, and KERRY LUCIANI, an individual, Defendants.	NO: CV-10-217-RMP ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This matter comes before the Court on a motion for summary judgment by the Defendants, ECF No. 40. Oral argument occurred on August 31, 2011. The Court has reviewed the relevant filings and pleadings and is fully informed.

BACKGROUND

The Plaintiff, Schree R. Wade, was an employee of Defendant Premera Blue Cross ("Premera") from 1990 until 2008. ECF Nos. 43 at 2, 74 at 2. While the record does not reveal the nature of Ms. Wade's early work at Premera, the record

shows that from approximately 1999 until 2001, Ms. Wade worked as an Analyst and then a Business Analyst in Premera's Health Care Economics Department ("HCE"). ECF No. 43 at 252. From 2001 through 2003, Ms. Wade worked as part of a program dedicated to upgrading Premera's claim processing software. ECF No. 43 at 252.

For a brief time in 2002, Ms. Wade came under the supervision of Defendant Kerry Luciani. ECF Nos. 74 at 2, 83 at 3. Ms. Wade asserts that during this time, Mr. Luciani was forging her name to projects on which he had worked. ECF No. 74 at 2-3. Mr. Luciani denies this allegation. ECF No. 84 at 1-2. After complaining about this activity to HCE's director, John Limm, Ms. Wade was placed under the supervision of Shawn Dever. ECF No. 74 at 2-3. While under the supervision of Mr. Dever, Ms. Ward received a positive performance review for 2002. ECF Nos. 74 at 3, 83 at 4-5.

In the last quarter of 2002, Ms. Wade was offered and accepted a position as the "HCE Auditor." ECF Nos. 74 at 3-4, 83 at 5. In an interoffice memorandum describing the position, Mr. Limm stated that it would have two primary areas of responsibility: audit pricing; and contractual and strategic account audits. ECF No. 75 at 46. The position had two non-audit responsibilities: updating codes in the claim system; and researching support payment policy. ECF No. 75 at 46. The description made clear that the position did not include the creation or review of

fee schedules. ECF No. 75 at 47. Even though Ms. Wade accepted the "HCE Auditor" position, her listed position on payroll records remained "Business Analyst 1." *E.g.* ECF No. 75 at 51.

Near the end of 2003, Mr. Dever left Premera and Mr. Luciani again became Ms. Wade's supervisor. ECF Nos. 74 at 3, 83 at 5. Although Mr. Luciani graded Ms. Wade's 2003 performance as a "2" out of four, Ms. Wade received a merit pay increase for that year.. ECF No. 76 at 6, 14. ECF No. 76 at 14.

Ms. Wade contends that Mr. Luciani began giving her assignments that were outside of her position as HCE Auditor. ECF No. 75 at 6. The assignments from Mr. Luciani included auditing claims for specific groups, auditing standard fee-schedule building by HCE staff, and engaging in random claim sampling. ECF No. 75 at 6. Mr. Luciani contends that he gave Ms. Wade projects in order to reduce her unproductive time which he felt was inordinate. ECF No. 84 at 2-3.

In December of 2004, Ms. Wade took leave under the Family Medical Leave Act ("FMLA") in order to care for her son following a surgery. ECF Nos. 74 at 5, 83 at 8. Mr. Luciani told Ms. Wade that she should come in at night to work to make up for the time she was missing during the day. ECF Nos. 74 at 5, 83 at 8. Ms. Wade asserts that she reported Mr. Luciani's actions to Premera's Human Resources department. ECF Nos. 74 at 5, 83 at 8. However, the Defendants assert

that, according to Ms. Wade's deposition testimony, Ms. Wade first went to Human Resources to complain about Mr. Luciani in 2007. ECF No. 85 at 25-26.

Ms. Wade's performance review for 2004, which was created by Mr. Luciani, was again a "2" out of four. ECF Nos. 74 at 5, 83 at 9. Again, Ms. Wade received a merit pay increase. ECF No. 76 at 25.

From June until October of 2005, Ms. Wade took FMLA leave for musculoskeletal injuries suffered as a result of working at Premera. ECF No. 75 at 7. While she was gone, Mr. Luciani required Ms. Wade to contact him on a daily basis to tell him whether she would be coming in to work. ECF Nos. 74 at 6, 83 at 10. Ms. Wade asserts that after she returned to work, Mr. Luciani gave her additional work and asked about audits that had not been done due to her absence. ECF Nos. 74 at 6, 83 at 10. Ms. Wade contends that Mr. Luciani knew that the work he was giving her was too much in light of her injury and that it aggravated her injury. ECF No. 75 at 8. The Defendants contend that there is no evidence that Mr. Luciani was aware of the limitations imposed on Ms. Wade by her injury. ECF No. 83 at 10. In June of 2005, Ms. Wade applied for worker's compensation, but she did not receive benefits until August of 2008. ECF Nos. 74 at 6, 83 at 10-11.

In November 2005, a Premera contractor performed an ergonomic assessment of Wade's work station. ECF No. 43 at 4. Ms. Wade asserts that the

contractor recommended that she acquire specific equipment that would improve her workstation's ergonomics; however, the equipment was not provided until Wade ordered the equipment herself. ECF Nos. 43 at 4, 74 at 11. Wade eventually did receive most, but not all, of the equipment that was recommended.[1] ECF Nos. 43 at 4, 74 at 11, 83 at 18-19.

In 2005, Mr. Luciani rated Ms. Wade's performance as a "3" out of four. ECF No. 76 at 31. Ms. Wade received a merit pay increase as well as a bonus. ECF No. 76 at 27, 29.

In August 2006, Ms. Wade suffered a seizure. ECF Nos. 74 at 7, 83 at 11-12. She took continuous leave for a little less than one month. ECF No. 43 at 3. Ms. Wade requested that she be allowed to work from home. ECF No. 43 at 3. Human Resources investigated what would be involved in allowing Ms. Wade to work from home and discovered that it would require special equipment. ECF No. 43 at 3. Before deciding whether or not to allow Ms. Wade to work from home, Ms. Wade met with her neurologist who cleared her to work at Premera. ECF No.

[1]The only specific item referenced in the record that Ms. Wade did not receive was a headset for her telephone. ECF No. 43 at 135-36. However, Ms. Wade expressed that she did not need the headset because she rarely used the telephone. ECF No. 43 at 50.

43 at 3-4. Premera decided to "table" the decision on whether Ms. Wade could work from home. ECF No. 43 at 3-4.

In 2006, Ms. Wade's neurologist prescribed that Ms. Wade should limit her driving. ECF No. 75 at 53. Ms. Wade requested permission to work from a different Premera office where her husband could drive her to work. ECF No. 74 at 7. Ms. Wade's request was denied, and Premera suggested that Ms. Wade should carpool. ECF Nos. 74 at 7, 83 at 11-12. Ms. Wade declined to carpool as she felt she could not fairly share the responsibilities of carpooling given her medical needs. ECF Nos. 74 at 7, 83 at 12.

Ms. Wade took intermittent FMLA leave starting in September of 2006 until the end of her time with Premera. ECF No. 43 at 3. Ms. Wade asserts that Mr. Luciani regularly asked her about her use of FMLA leave and her medical appointments during their weekly one-on-one meetings. ECF No. 74 at 8. The Defendants contend that this assertion is contradicted by Ms. Wade's deposition testimony. ECF No. 83 at 13. Ms. Wade asserts that Mr. Luciani "verbally challenged" Ms. Wade about the filing of her claim for worker's compensation. ECF No. 74 at 8. In Ms. Wade's deposition testimony, Ms. Wade describes Mr. Luciani as asking her why she would file a worker's compensation claim and asking about the types of doctors who she was seeing. ECF No. 43 at 192-93. Ms. Wade asserts that after she returned from FMLA leave, Mr. Luciani again gave her

extra work that she was unable to complete due to her disability and that the extra work worsened her disability. ECF Nos. 74 at 8-9, 83 at 14-15.

Mr. Luciani rated Ms. Wade's 2006 performance as a "2+." ECF No 43 at 209. The record does not reveal whether Ms. Wade received a merit pay increase for her 2006 performance. On July 19, 2007, Mr. Luciani met with Ms. Wade and delivered an action plan. ECF No. 43 at 6, 219-20. The action plan focused on Ms. Wade's tracking her absences from work and tracking the projects assigned to Ms. Wade by Mr. Luciani. ECF No. 43 at 5, 219-20. Ms. Wade asserts that Mr. Luciani required her to track her time to the minute. ECF No. 74 at 12.

On October 19, 2007, Wade was nominated for an award for excellence for being a "role model for others" and exemplifying the "values to which Premera aspires." ECF Nos. 74 at 9, 83 at 15. The record does not reveal either the process or criteria for nomination. At a meeting on March 26, 2008, Mr. Luciani reprimanded Ms. Wade for poor work performance. ECF No. 74 at 9. Ms. Wade asserts that when she notified Mr. Luciani that she thought his behavior towards her constituted harassment, Mr. Luciani "lunged" towards her in anger. ECF No. 74 at 9. Ms. Wade's deposition testimony describes the event as her and Mr. Luciani alone in a conference room sitting a couple of feet apart when Mr. Luciani turned red and suddenly moved forward. ECF No. 43 at 107-08.

On March 26, 2008, Ms. Wade received a written warning about her performance. ECF No. 43 at 226-231. Ultimately, Mr. Luciani rated Ms. Wade's 2007 performance as a "2" out of four. ECF No. 43 at 236. Ms. Wade did not receive a 2007 merit pay increase. ECF Nos. 74 at 10, 83 at 16-17.

APPLICABLE LAW

Summary Judgment Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A key purpose of summary judgment "is to isolate and dispose of factually unsupported claims . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is "not a disfavored procedural shortcut," but is instead the "principal tool[ ] by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Celotex*, 477 U.S. at 327.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 323. The moving party must demonstrate to the Court that there is an absence of evidence to support the non-moving party's case. *See Celotex Corp.*, 477 U.S. at 325. The burden then

shifts to the non-moving party to "set out 'specific facts showing a genuine issue for trial.'" *Celotex Corp.*, 477 U.S. at 324 (quoting Fed. R. Civ.P. 56(e)).

A genuine issue of material fact exists if sufficient evidence supports the claimed factual dispute, requiring "a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987). At summary judgment, the court draws all reasonable inferences in favor of the nonmoving party. *Dzung Chu v. Oracle Corp.* (*In re Oracle Corp. Secs. Litig.*), 627 F.3d 376, 387 (9th Cir. 2010) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). The evidence presented by both the moving and non-moving parties must be admissible. Fed. R. Civ. P. 56(e). The court will not presume missing facts, and non-specific facts in affidavits are not sufficient to support or undermine a claim. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

Burden Shifting Framework

With regard to claims under Washington's Law Against Discrimination ("WLAD"), "Washington courts have largely adopted the federal protocol announced in [*Green v.*] *McDonnell Douglass* [*Corp.*, 411 U.S. 792 (1973)]" for determining whether a party is entitled to judgment as a matter of law." *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180 (2001) *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214 (2006). Under that framework, "[t]he

plaintiff bears the first intermediate burden, namely, that of setting forth a prima facie case of unlawful discrimination." *Id.* at 181 (citing *McDonell Douglass*, 411 U.S. at 802). The plaintiff may satisfy this burden by providing direct evidence of discriminatory intent, or the plaintiff may present circumstantial evidence of the elements constituting a prima facie case of discrimination. *Katsanis v. Educ. Emps. Credit Union*, 122 Wn.2d 483, 490-92 (1993). If the plaintiff fails to establish a prima facie case and fails to provide direct evidence of discriminatory intent, the defendant is entitled to judgment as a matter of law. *Id.* (citing *Katsanis*, 122 Wn.2d at 490).

However, if the plaintiff establishes a prima facie case, "a 'legally mandatory, rebuttable presumption' of discrimination temporarily takes hold." *Id.* (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981)). The burden of production then "shifts to the defendant to produce admissible evidence of a legitimate, nondiscriminatory explanation for the adverse employment action sufficient to 'raise[] a genuine issue of fact as to whether [the defendant] discriminated against the plaintiff.'" *Id.* (quoting *Burdine*, 450 U.S. at 254-55) (alterations in original). If the defendant fails to produce such evidence, the plaintiff is entitled to judgment as a matter of law. *Id.* at 181-82 (citing *Kastanis*, 122 Wn.2d at 490). If the defendant meets his or her burden of production, then the rebuttable presumption created by the plaintiff's establishment

of the prima facie case is rebutted and ceases to exist. *Id.* at 182 (citing *St Mary's Honor Ctr. V. Hicks*, 509 U.S. 502, 510-11 (1993)).

After the presumption is removed, the burden of production reverts to the plaintiff "who must then 'be afforded a fair opportunity to show that [defendant's] stated reason for [the adverse action] was in fact pretext.'" *Id.* (quoting *McDonnell Douglass*, 411 U.S. at 804) (alterations in original). "If the plaintiff proves incapable of doing so, the defendant becomes entitled to judgment as a matter of law." *Id.* (citing *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 365 (1988)).

Where the plaintiff establishes a prima facie showing and presents sufficient evidence for a rational trier of fact to disbelieve the defendant's nondiscriminatory explanation for the adverse employment action, the case should ordinarily be presented to a fact-finder. *Id.* at 185-86. "Once a court determines that the parties have met all three *McDonnell Douglas* intermediate burdens and that the record contains *reasonable but competing* inferences of both discrimination and nondiscrimination, 'it is the jury's task to choose between such inferences.'" *Id.* at 186 (quoting *Carle v. McChord Credit Union*, 65 Wn. App. 93, 102 (1992)). The plaintiff always carries the burden of persuasion, and, to succeed on the merits, must show that it is more likely than not that unlawful discriminatory animus was a substantial factor in the adverse employment action. *Id.* at 180-81, 186-87.

DISCUSSION

Discrimination Claims

Adverse employment action.

Many of the plaintiff's claims require a showing of an adverse employment action. The parties disagree over what actions qualify as adverse employment actions. Ms. Wade asserts that she suffered three adverse employment actions: (1) demotion through the changing of her job duties; (2) imposition of additional conditions on her further employment; and (3) denial of a merit pay increase in 2008 for her 2007 performance. The Defendants assert that the only possible adverse employment action was the denial of the merit pay increase.

"An actionable adverse employment action must involve a change in employment conditions that is more than an 'inconvenience or alteration of job responsibilities.'" *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465 (2004) (quoting *DeGuiseppe v. Vill. Of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995) (quoting *Crady v. Liberty Nat'l Bank & Trust Co. of Indiana*, 993 F.2d 132 (7th Cir. 1993))). "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Crady*, 993. F.2d at 136. "Yelling at an employee or threatening to fire an

employee is not an adverse employment action." *Kirby*, 124 Wn. App. at 465 (citing *Munday v. Waste Mgmt. of N. Am. Inc.*, 126 F.3d 239, 343 (4th Cir. 1997)).

The specific requirements that Ms. Wade asserts constituted a demotion or imposition of additional duties are: (1) the requirement that she track her time; (2) the requirement that she remain on Premera's campus even during lunch breaks; (3) the requirement that she inform Mr. Luciani of her medical conditions, appointments, and treatments; and (4) the requirement that she perform projects outside of her job description. ECF No. 73 at 4. The Court concludes that none of these requirements constitute an adverse employment action. As the *Kirby* court stated, "inconvenience and alteration of job responsibilities" are insufficient to be considered adverse employment actions. *Kirby*, 124 Wn. App. at 465 (internal quotations omitted). The addition of work, the requirement that she track her time, restrictions on her ability to leave work, and the requirement that she report her medical appointments constitute changes to her job responsibilities that undoubtedly were an inconvenience. Such requirements are different in kind from a change in title, a change in pay, or change in benefits that typically constitute an adverse employment action. Accordingly, the only adverse employment action alleged by the Plaintiff is the lost merit pay increase in 2008 for her 2007 performance.

Gender discrimination.

The parties agree that in order to establish a prima facie case for gender discrimination under Washington law, the Plaintiff must show that (1) she is in a protected class; (2) she was treated less favorably in terms of employment; (3) than a similarly situated non-protected employee, and (4) she and the non-protected employee were doing substantially equal work. *Washington v. Boeing Co.*, 105 Wn. App. 1, 13 (2000). Prima facie evidence also can be established by direct evidence of discriminatory intent. *Kastanis*, 122 Wn.2d at 491.

Although Ms. Wade is in a protected class as a female, there is no evidence in the record of a male employee similarly situated to Ms. Wade who was treated more favorably than Ms. Wade. Accordingly, Ms. Wade fails to establish a prima facie case of gender discrimination with circumstantial evidence. Additionally, there is no direct evidence in the record that the decision not to give Ms. Wade a merit raise in 2008 was caused by gender animus. Accordingly, Ms. Wade has failed to make a prima facie showing of gender discrimination and the Defendants are entitled to judgment as a matter of law on the gender discrimination claim.

Disability discrimination.

The parties agree that in order to establish a prima facie case for disability discrimination under Washington law, the Plaintiff must show that: (1) she was disabled; (2) suffered an adverse employment action; (3) was doing satisfactory

work; and (4) the adverse action occurred such that it raises a reasonable inference of unlawful discrimination. *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 484 (2004). The Defendants argue that Ms. Wade has failed to establish elements three and four. The Court finds that Ms. Wade has failed to present evidence that raises a reasonable inference of unlawful discrimination in Premera's decision to not give Ms. Wade a merit raise, the only adverse employment action recognized in this case, and, therefore, the Court does not address whether Ms. Wade was doing satisfactory work.

Ms. Wade has presented no evidence other than proximity in time to support her showing that her disability was a substantial factor in the decision not to give her a merit pay increase. Ms. Wade first took leave for her musculoskeletal injuries in October of 2005. ECF No. 74 at 6. Ms. Wade took leave for a seizure in 2006. However, Ms. Wade received merit pay increase in 2006, and there is no evidence in the record that Ms. Wade was denied a raise in 2007. It wasn't until 2008 that the record establishes that the Defendants denied Ms. Wade a raise. Such timing fails to give rise to a reasonable inference that unlawful discrimination based on Ms. Wade's disability was a factor in the Defendants' decision to deny Ms. Wade a merit pay increase in 2008. The Court concludes that Ms. Wade has failed to establish a prima facie showing of disability discrimination, and the Defendants are entitled to judgment as a matter of law.

Discrimination for Ms. Wade's worker's compensation claim.

The parties agree that in order to establish a prima facie case for discrimination in retaliation for a worker's compensation claim the Plaintiff must show that: (1) she exercised a right to pursue workers' compensation benefits; (2) she suffered an adverse employment action; and (3) that there is a causal connection between the exercise of the legal right and the adverse employment action. *Wilmot v. Kaiser Aluminum and Chem. Corp.*, 118 Wn.2d 46, 68-69 (1991). In establishing the prima facie element of causation, the plaintiff need not prove that the employer's sole motivation was retaliation. *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 491 (2004). It is enough to produce evidence that the plaintiff's decision to seek workers' compensation was one of the causes of the adverse employment action. *Id.* (citing *Wilmot*, 118 Wn.2d at 70). *Id.* (citing *Wilmot*, 118 Wn.2d at 69). To establish causation in a prima facie case, "'[p]roximity in time between the claim and the firing is a typical beginning point, coupled with evidence of satisfactory work performance and supervisory evaluations."

Ms. Wade claimed worker's compensation coverage in June of 2005. ECF No. 74 at 6. She ultimately received benefits in August of 2008. ECF No. 74 at 6. The decision not to give Ms. Wade a merit raise was made in April of 2008. ECF Nos. 43 at 8, 74 at 10. Accordingly, the adverse employment action came almost

three years after the claim for benefits was made and months before benefits were provided. Accordingly, there is no proximity in time between the alleged adverse employment action and either the request for benefits or the reception of benefits. Accordingly, the Court draws no inference that the events are related.

Ms. Wade points to a comment made by Mr. Luciani in 2007 regarding Ms. Wade's worker's compensation claim as evidence of proximity and causation. According to Ms. Wade's deposition testimony, Mr. Luciani asked her why she would file a worker's compensation claim. ECF No. 43 at 191-94. Ms. Wade does not identify any other conduct by the Defendants in 2007 beyond Mr. Luciani's asking why she was seeking worker's compensation. Such evidence is insufficient to support an inference that there is a causal link between the adverse employment action and Ms. Wade's seeking worker's compensation.

Retaliation.

Retaliation claims are subject to the same burden shifting scheme as the other discrimination claims under the WLAD. *Milligan v. Thompson*, 110 Wn. App. 628, 638-39 (2002). To establish a prima facie case for retaliation, the Plaintiff "must show that (1) she engaged in statutorily protected activity, (2) [the Defendants] took some adverse employment action against her, and (3) retaliation was a substantial factor behind the adverse employment action." *Boeing*, 105 Wn. App. at 14.

Ms. Wade asserts that she engaged in two statutorily protected activities: (1) reporting Mr. Luciani for harassment; and (2) taking FMLA leave.[2]

Reporting harassment

Ms. Wade met with Mr. Luciani on March 26, 2008. ECF No. 75 at 12. At that meeting, Mr. Luciani gave Ms. Wade a written warning about her performance. ECF No. 34 at 226-31. Ms. Wade told Mr. Luciani that she believed his conduct constituted harassment and she reported a claim of harassment to Premera's human resources department. ECF No. 74 at 9. On April 9, 2008, Ms. Wade was informed that she would not be receiving a merit pay increase based on her 2007 performance. ECF No. 43 at 256. Wade did not receive a written evaluation of her 2007 performance until May 12, 2008.

The Defendants seek summary judgment arguing that Ms. Wade has failed to provide evidence that Ms. Wade's report of harassment was a substantial factor in Premera's decision not to award her a merit pay increase. However, the "substantial factor" element may be satisfied if the protected activity and adverse action were proximate in time and there is evidence that the employee was performing satisfactory work. *Campbell v. State*, 129 Wn. App. 10, 23, 118 P.3d 888, 893-94 (2005). The report of harassment occurred in March 2008. The

[2]Ms. Wade also asserts that she was retaliated against for seeking worker's compensation benefits; however, that claim already has been addressed above.

decision not to give Ms. Wade a raise came the very next month. Accordingly, the events were proximate. However, Ms. Wade fails to present evidence that she was performing satisfactory work.

The evidence in the record shows that while Ms. Wade was rated as a "3" out of four for 2005, her performance rating slipped to a "2+" for 2006. In 2007, Ms. Wade was placed under an action plan, her performance was rated a "2," and she was given a written warning about her performance. In support of Ms. Wade's argument that her performance level presents an issue of fact for the jury, Ms. Wade presents a letter from 2007 showing that Ms. Wade had been nominated for a "Spirit of Excellence Award" which "demonstrates that you are a role model for others and that you exemplify the values to which Premera aspires." ECF No. 75 at 57. Nothing from the face of this nomination suggests that it was provided to Ms. Wade based her performing satisfactory work. Additionally, the record does not reveal what criteria or process are used to determine who gets nominated. Accordingly, no reasonable jury could find from this evidence alone that Ms. Wade was performing satisfactory work.

As a result, the proximity between Ms. Wade's complaint of harassment and Premera's decision not to give Ms. Wade a merit performance increase does not give rise to an inference that Ms. Wade's complaint was a substantial factor in Premera's decision not to give her a merit pay increase. Ms. Wade has failed to

present any other evidence showing a nexus between her complaint of harassment and Premera's decision not to award her a merit pay increase. Accordingly, Ms. Wade has failed to meet her prima facie burden.

FMLA leave

Ms. Wade took FMLA leave in June of 2004; from June 24, 2005 to October 3, 2005; for one month in 2006, and intermittently from September 12, 2006, until the end of her employment. ECF No. 43 at 2-3. Ms. Wade received merit pay increases for every year[3] except 2008 for her 2007 performance. Accordingly, there is no inherent proximity between Ms. Wade's taking of FMLA and Premera's decision not to give her a pay increase. Ms. Wade has failed to present any other evidence that her FMLA leave was a substantial factor in Premera's decision to not give her a merit pay increase.

Reasonable accommodation of disability.

An employer has a duty to reasonably accommodate a worker with a disability unless such accommodation would be an undue hardship. *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 373 (2005) (citing *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639 (2005)). In order to establish a prima facie

[3]The record does not reveal whether Ms. Wade received a raise or not in 2007 for her 2006 performance.

case for discrimination based on failure to accommodate a disability the Plaintiff must establish:

> (1) that she had a sensory, mental, or physical abnormality that substantially limited her ability perform the job; (2) the employee was qualified to perform the essential functions of the job in question; (3) the employee gave the employer notice of the abnormality and its accompanying substantial limitations; and (4) upon notice, the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality.

Townswend v. Walla Walla School Dist., 147 Wn. App. 620, 626-27 (2008).

The employee must give the employer notice of her abnormality, and such notice must inform the employer that the abnormality substantially limits the employee's ability to perform her job. *See Roeber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 140 (2003); *Hume v. American Disposal Company*, 124 Wn.2d 656, 672 (1994). The employee need not give notice of the full nature and extent of the disability. *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408 (1995). Once notice is given, the employer must take positive steps to accommodate the employee's limitations including determining the extent of the disability. *Id.* The employee "retains a duty to cooperate with the employer's efforts by explaining her disability and qualifications." *Id.*

The employer need not provide the specific accommodation requested by the employee. *Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 443 (2002) (quoting

Sharpe v. Am. Tel. & Tel. Co., 66 F.3d 1045, 1050 (9th Cir. 1995)). Instead, "[i]n determining what is a reasonable accommodation, the evaluation must begin with the job specifications and how those tasks are impacted by the abnormal condition." *Doe v. Boeing Co.*, 121 Wn.2d 8, 20 (1993) (citing *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 879 (9th Cir. 1989)).

The parties agree that Ms. Wade suffers from one or more disabilities. The record evidences two conditions suffered by Ms. Wade: (1) a seizure in 2006; and (2) musculoskeletal injuries starting in 2005. ECF No. 75 at 7, 9.

Ms. Wade's seizure

Ms. Wade suffered a seizure at work in 2006. ECF No. 75 at 9. Originally, Ms. Wade requested that she be allowed to work from home. ECF No. 75 at 9. However, after her appointment with a neurologist was moved to an earlier time and she was cleared to return to work, Ms. Wade converted her request to a request that she be allowed to work at the Sprague office. ECF No. 34 at 142. Ms. Wade's request was based on her Doctor's prescribed restriction that she limit her driving. ECF No. 75 at 53. Ms. Wade claims that working at the Sprague office would allow Ms. Wade's husband to be available to drive her to work. Premera denied Ms. Wade's request to work from the Sprague office in either September or October of 2006. ECF No. 75 at 10, 55.

The statute of limitations on a reasonable accommodation claim is three years. RCW 4.16.080(2). A cause of action for failure to accommodate a disability "accrues when the employer makes the decision not to accommodate the employee's [disability] and that decision is communicated to the employee." *Hinman v. Yakima School Dist. No. 7*, 69 Wn. App. 445, 449-50 (1993).

Premera communicated to Ms. Wade in late 2006 that it was not going to allow her to work at the Sprague location. Ms. Wade filed the instant action on June 7, 2010. Accordingly, Ms. Wade's failure to accommodate claim for the driving limitation imposed by her seizure was brought more than three years after it accrued. Therefore, the claim is time-barred.

Ms. Wade's musculoskeletal injuries

Ms. Wade alleges that she suffers from work-induced musculoskeletal injuries affecting her neck, shoulders, and left arm. ECF No. 75 at 7. Ms. Wade asserts that she made three requests for accommodation regarding her musculoskeletal injuries: (1) a request for more ergonomic working equipment; (2) a request to work part-time; and (3) a request that Mr. Luciani reduce or eliminate the project work that he was assigning.

Washington recognizes two types of disabilities: (1) "either the impairment must be the source of a substantial limitation or [(2)] there must be medical documentation indicating a reasonable likelihood that engaging in the job duties

without accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect." *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 30-31 (2010) (internal quotations omitted).

Nowhere in the record is it apparent what limitations Ms. Ward's injuries placed upon her ability to work. While there is evidence that Ms. Ward's injuries eventually rendered her unable to work at all, such inability appears to have arisen at some time in 2008. ECF No. 34 at 173-74. The parties have agreed that Ms. Ward suffers from a disability. However, the parties have provided no evidence with which the Court can determine the nature of the limitation suffered by Ms. Ward. Without knowing the limitations imposed by Ms. Wade's disability, the Court cannot determine whether the accommodations sought by Ms. Ward are reasonable or whether any accommodations are available to the employer. In short, it is impossible for this Court to find that "the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality." *Townswend v. Walla Walla School Dist.*, 147 Wn. App. 620, 626-27 (2008).

Ms. Wade has provided evidence, in the form of a declaration, suggesting that Mr. Luciani's assigning her project work aggravated her injuries. ECF No. 75 at 11. However, to establish liability based on a theory that a failure to accommodate an injury will worsen the injury to the point where it becomes a

substantial limitation, a plaintiff must provide "medical documentation" to that effect. *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 30-31 (2010). Ms. Wade has provided no medical documentation in support of her musculoskeletal injury accommodation claim. Accordingly, Ms. Wade has failed to meet her burden to establish a prima facie case that Premera failed to accommodate her musculoskeletal injuries.

Harassment / Hostile work place.

In order to establish a case for discrimination based on a hostile work environment the Plaintiff must show that (1) the complained of conduct was unwelcome; (2) the complained of conduct was motivated by a protected characteristic; (3) the complained of conduct was sufficiently pervasive so as to alter the terms or conditions of employment and create an abusive working environment; and (4) the harassment can be imputed to the employer. *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-407 (1985).

In determining whether conduct was sufficiently pervasive so as to alter the terms or conditions of employment and create an abusive working environment, a court looks to the "totality of the circumstances." *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 296-97 (2002). A court looks "at whether the conduct involved words alone or also included physical intimidation or humiliation." *Id.* at 297. The conduct must be both objectively abusive under a reasonable person test

and subjectively perceived to be abusive by the victim. *Id.* (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).

The amended complaint identifies Mr. Luciani as the harassing party, but does not specifically identify what conduct constituted harassment. In her memorandum opposing this motion, Ms. Wade identifies the following conduct as constituting harassment: (1) low performance reviews; (2) assigning non-audit project work; (3) repeatedly inquiring as to Wade's medical conditions and her treatments; (4) "lunging" towards Wade; and (5) "discipline." ECF No. 73 at 13-14.

Except for Mr. Luciani's "lunge," none of the conduct identified by Ms. Wade would qualify as objectively abusive. Accordingly, no reasonable jury could find that such conduct produced such a pervasively abusive environment as to constitute a change in work conditions. While physical threats can create the type of environment required to sustain an action for harassment based on a hostile work environment, isolated incidents are insufficient to establish the pervasively abusive environment required. *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 857-58 (2000) (quoting *Glasgow*, 103 Wn.2d at 406-07.). Mr. Luciani's "lunge" is insufficient to support Ms. Wade's claim for harassment because it was an isolated incident. Accordingly, the Defendants are entitled to summary judgment on the harassment / hostile work place claim.

Negligence Claims

The Plaintiff's complaint alleges only "negligence." In her memorandum in opposition to the instant motion, the Plaintiff clarifies that her claims are for negligent supervision and negligent infliction of emotion distress.

Negligent supervision.

Ms. Wade's negligent supervision claim is dependent on her hostile workplace claim. The Plaintiff asserts that Premera management failed to address the hostile workplace created by Defendant Kerry Luciani. There is a special rule for negligent supervision in the hostile work environment context. *See Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 837-38 (2000). In order for an employer to be liable for a hostile work environment created by a supervisor, the employee must show (1) that the employer authorized, knew, or should have known of the harassment; and (2) that the empoyer failed to take reasonably prompt and adequate corrective action. *Id.* at 837. Because Ms. Wade's hostile work place claim fails, her negligent supervision claim also fails as a matter of law.

Negligent infliction of emotional distress.

Washington recognizes the tort of negligent infliction of emotional distress. *Hunsley v. Giard*, 87 Wn.2d 424, 435 (1976). In addressing negligent infliction of emotional distress claims, Washington courts focus on the typical tort structure of

(1) a duty, (2) a breach of that duty, (3) proximate cause, and (4) a compensable injury. *Snyder v. Medical Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243 (2001).

"The existence of a duty is a question of law and depends on mixed considerations of 'logic, commons sense, justice, policy, and precedent.'" *Id.* at 243 (quoting *Lords v. N. Auto. Corp.*, 75 Wn. App. 789, 596 (1994)) (internal quotations omitted). "The defendant's obligation to refrain from particular conduct is owed only to those who are *foreseeably* endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous." *Id.* at 245. (emphasis in original) (internal quotations omitted). "Conduct is unreasonably dangerous when its risks outweigh its utility." *Id.* "[A]bsent a statutory or public policy mandate, employers do not owe employees a duty to use reasonable care to avoid the inadvertent infliction of emotional distress when responding to workplace disputes." *Bishop v. State*, 77 Wn. App. 228, 234-35 (1995). "The courts cannot guarantee a stress-free workplace." *Id.* at 235.

Nothing in the record establishes that Mr. Luciani or Premera engaged in "unreasonably dangerous" activity or that any of the actions taken in this case fall outside of "responding to workplace disputes." While the court does not doubt that there was friction between Ms. Wade and Mr. Luciani, workplace strife is generally not actionable as a claim for negligent infliction of emotional distress.

Accordingly, Ms. Wade has failed to present evidence in support of her claim for negligent infliction of emotional distress.[4]

Intentional Infliction of Emotional Distress (Outrage)

The parties agree that in order to prevail on a claim for outrage a plaintiff must show: (1) that the defendants engaged in extreme and outrageous conduct; (2) that the defendants intentionally or recklessly inflicted emotional distress; and (3) that the plaintiff actually suffered severe emotional distress. *Strong v. Terrell*, 147

[4]Ms. Wade points to the WLAD and the FMLA for the proposition that a breach of the WLAD or the FMLA may give rise to a cause of action for negligent infliction of emotional distress. While the *Bishop* court did state that "absent a statutory or public policy mandate" employers had no duty to avoid the inadvertent infliction of emotional injuries on employees during workplace disputes, the *Bishop* court did not state that the an action seeking emotional damages for statutory violations would constitute a negligent infliction of emotional distress action. *See Bishop*, 77 Wn. App. at 234-35. Instead, the court was merely reflecting that emotional damages may still be available for violations of civil rights statutes. *See e.g. Wheeler v. Catholic Archdiocese*, 65 Wn. App. 552 (1992). Here, the Court already has rejected Ms. Wade's WLAD claims. Additionally, Ms. Wade has failed to allege any claims under the FMLA. Accordingly, Ms. Wade has not established a basis for recovering emotional damages.

Wn. App. 376, 385 (2008). "Any claim of outrage must be predicated on behavior '"so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."'" *Id.* (quoting *Kloepfel v. Bokor*, 149 Wn.2d 192, 195-96 (2003) (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59-60 (1975))).

Here, no reasonable jury could find that the conduct described in the record constitutes conduct sufficiently outrages that it could support an action for intentional infliction of emotional distress. Accordingly, MS. Wade's claim fails for lack of evidence.

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED:**

1. The Defendants' motion for summary judgment, **ECF No. 40**, is **GRANTED**.
2. The Plaintiff's claims in the above-captioned action are **DISMISSED WITH PREJUDICE** and without costs to either party.
3. **JUDGMENT** shall be entered for the Defendants.

IT IS SO ORDERED.

The District Court Executive is hereby directed to enter this Order, enter

judgment for Defendants, provide copies to counsel, and **CLOSE** this file.

DATED this 3rd of January 2012.

s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
Chief United States District Court Judge